



FTC INTENSIFIES SCRUTINY OF “NATIVE ADVERTISING”

by John C. Greiner and Zoraida M. Vale

Traditional advertisements have fallen out of favor with consumers. People can now digitally record their favorite shows and fast-forward through those pesky commercials. Streaming services even offer their customers the option of paying just a little bit more for the privilege of viewing their favorite shows without commercial interruption. This growing aversion to advertisements and the emergence of mechanisms to avoid them have made native advertising the go-to method for businesses to market their goods and services.

The Interactive Advertising Bureau (IAB), an industry self-regulatory organization, describes native advertising as “paid ads that are so cohesive with the page content, assimilated into the design, and consistent with the platform behavior that the viewer simply feels that they belong.”¹ As discussed in a 2015 WLF LEGAL BACKGROUNDER, such cohesion gives rise to complicated First Amendment issues, especially in those situations where the content is editorial in nature and contains no “buy this” exhortation.² Those free speech concerns have not deterred the Federal Trade Commission (FTC), however, from devoting considerable policy and enforcement resources to native advertising

Last December FTC released an *Enforcement Policy Statement on Deceptively Formatted Advertisements* (Policy) as well as *Native Advertising: A Guide for Businesses* (Guide). A few months later, the Commission reached a settlement with Lord & Taylor over claims that the retailer’s native ads were deceptive.

FTC’s Policy and Guide dictate that advertisers can avoid deceptive advertising practices by ensuring that: (1) The ad is transparent; (2) Disclosures are provided when it may not be clear to a consumer that he or she is looking at an ad; and (3) Disclosures must be clear and prominent.

In determining whether disclosure is necessary, FTC relates that advertisers must look at the ad as a whole and weigh factors, such as: the ad’s overall appearance; the similarity of its written, spoken, or visual style or subject matter to non-advertising content on the media platform on which it appears; and the degree to which it is distinguishable from the other noncommercial content on that platform.

The Guide provides 17 examples of situations where clear and prominent disclosures are necessary to inform consumers they are viewing an ad. One example is a kitchen cabinet company paying an online lifestyle magazine to create an article regarding “must haves” for a great kitchen. Because the layout of the article is similar to other articles appearing in the online magazine, and the article promotes the advertiser’s products, the format is likely to mislead consumers to believe the article contains independent views instead of the sponsoring advertiser’s views. Therefore, a disclosure of the article’s commercial nature is required.

Furthermore, if that article can be accessed directly without going to the magazine’s website, then the click-in link must clearly and prominently identify the link as an ad. Such a disclosure is also necessary if the

¹ IAB Native Advertising Playbook, Dec. 4, 2013, available <http://www.iab.net/media/file/IAB-Native-Advertising-Playbook2.pdf>.

² John C. Greiner, *Supreme Court Corporate Speech Rulings Fortify First Amendment Rights of Content Marketers*, WLF LEGAL BACKGROUNDER (Apr. 24, 2015), available at http://www.wlf.org/upload/legalstudies/legalbackgrounder/042415LB_Greiner.pdf.

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article appears on the online magazine's newsfeed or content-recommended widget. FTC also provides several examples of when disclosures are necessary in entertainment programming, video games, social media, and non-paid search-engine results.

A disclosure is "clear and prominent" when a reasonable consumer can recognize the native ad as an ad. FTC explains how it would assess whether a disclosure is clear and prominent. First, FTC would consider the proximity and placement of the disclosure. For example, the disclosure should appear near a native ad's headline and be placed in front of or above the headline. The disclosure may also need to be placed on the native ad's focal point if it is a graphic or image. The consumer should receive the disclosure before receiving the advertising message. Further, a disclosure should never be lost when others republish the native ad.

Second, the disclosure should stand out so consumers can easily read or hear it. Lastly, a reasonable consumer must easily understand the disclosure. The disclosure should use plain language that does not contain technical or industry jargon, terminology that carries different meanings, unfamiliar icons or abbreviations, or company logos or brand names without a clear text disclosure.

In March 2015, Lord & Taylor launched a social media campaign to promote its new Design Lab clothing collection. The campaign was centered on one dress from the collection. Lord & Taylor gifted the dress to 50 fashion influencers and paid them to each post one photo of themselves wearing the dress on Instagram, mention "@lordandtaylor," and use the hashtag "#DesignLab" in the photo caption. The contract between Lord & Taylor and the fashion influencers did not obligate them to disclose in their Instagram photo that Lord & Taylor had compensated them. In fact none of the 50 posts contained such a disclosure. Lord & Taylor's native ad campaign apparently worked, as the dress sold out.

FTC filed a complaint against Lord & Taylor, alleging it had represented directly, or indirectly, that the 50 Instagram posts reflected the independent statements of impartial fashion influencers. FTC alleged that disclosing that the fashion influencers had been paid would be material to consumers in their decision to purchase the dress, and that the failure to disclose facts regarding compensation was a deceptive practice under § 5 of the Federal Trade Commission Act.

FTC will monitor Lord & Taylor's compliance efforts for five years, and the consent order will stay in effect for 20 years. Under the settlement, Lord & Taylor must:

- (1) Provide each endorser with a clear statement of his or her responsibility to disclose the endorser's material connection to Lord & Taylor, and obtain from each endorser a signed and dated statement acknowledging receipt of that statement and expressly agreeing to comply with it;
- (2) Establish and maintain a system to monitor and review the representations and disclosures of endorsers; and
- (3) Immediately terminate any endorser with a material connection to Lord & Taylor that has misrepresented his or her independence and impartiality.

As the nature of consumers and how they interact with businesses changes, product makers and service providers face increased pressure to adapt their marketing strategies. As businesses design and implement new strategies, which can feature traditional advertising alongside non-sales content, they should be aware of and prepared to defend their First Amendment speech rights. At the same time, businesses must understand that notwithstanding those rights, FTC has demonstrated a concern that native advertising can mislead consumers. Marketers should thus become familiar with the recently issued FTC Enforcement Policy and Guide, and also assess the Commission's consent agreement with Lord & Taylor for some insight on how FTC interprets them.